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No. 83-1488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GLOBAL TERMINAL & CONTAINER SERVICES, INC.,

Petitioner,

—against—

COLGATE PALMOLIVE COMPANY, DART CONTAINER LINE, LTD., LANSDELL PROTECTIVE AGENCY and AETNA CASUALTY & SURETY COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT COLGATE PALMOLIVE COMPANY IN OPPOSITION TO PETITION OF GLOBAL TERMINAL & CONTAINER SERVICES, INC.

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Diana Manufacturing Company
Etonic, Inc.
Hill's Topeka
The Kendall Company
Louie Glass Company, Inc.
Medasonics, Inc.
N.D.M. Corporation
Pet Chemicals, Inc.
Plastronics, Inc.
Plastronics, Inc. MPC
Princess House, Inc.
Respiratory Care, Inc.
Riviana Foods, Inc.

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STATEMENT

Petitioner Global asks the Court to enforce a contractual extension of the Carriage of Goods By Sea Act package limitation to a conversion of goods occurring in its warehouse on land despite a state law prohibition against limitations of liability in cases of conversion. Respondent Colgate opposes the petition on the grounds that torts occurring on land have never been considered within federal admiralty jurisdiction; and the protection of a warehouseman who converts cargo entrusted to him is clearly not an adequate or compelling reason for the judicial extension of admiralty jurisdiction sought by Global in its petiiton.

REASONS FOR NOT GRANTING THE WRIT

1. "Uniformity of maritime law" is not a valid consideration warranting the granting of Global Terminal's petition since the case concerns the tort of conversion occurring in a warehouse on land, which has never been considered within the ambit of admiralty and maritime jurisdiction.

Admiralty jurisdiction in tort has traditionally been held defined by locality; that is, torts occurring on navigable waters are considered within the admiralty jurisdiction and torts occurring on land are considered subject to local law. This principle

was recognized in the celebrated opinion of Mr. Justice Story in De Lovio v. Boit, 7 F. Cas. 418,444, (C.C.D. Mass. 1815) (No: 3776) where "...torts, and injuries," were held "...necessarily bounded by locality."

This rule has been consistently adhered to as recently as Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971), where this Court refused to extend admiralty jurisdiction to a longshoreman injured on the pier while moving cargo ultimately destined to be loaded aboard ship. Mr. Justice White held:

> "We hold that under the controlling precedents, federal maritime law does not govern this accident. Nor, in the absence of

> congressional guidance, are we now inclined to depart from prior law and extend the reach of the federal law to pier-side accidents caused by a stevedore's pier-based equipment.
>
> The historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and the maritime law governs only those torts occurring on the navigable waters of the United States." 404 U.S. 202,204,205.

Nor does the statute sought to be applied provide any support for defendant's position. The Carriage of Goods by Sea Act (COGSA) 46 U.S.C. 1300 et seq. (1976) has been specifically held by this Court to be inapplicable to stevedores and carrier's agents.

In Robert C. Herd & Co. Inc. v. Krawill Machinery, 359 U.S. 297 (1959), this Court held:

> "The debates and committee Reports in the Senate and the House upon the bill that became the Carriage of Goods by Sea Act likewise do not mention stevedores or agents. There is, thus, nothing in the language, the legislative history or environment of the Act that expressly or impliedly indicates any intention of Congress to regulate stevedores or other agents of a carrier, or to limit the amount of their liability for damages caused by their negligence. It must be assumed that Congress knew that generally agents are liable for all damages caused by their negligence. Yet Congress, while limiting the amount of liability of 'the carrier [and] the ship,' did not even refer to stevedores or agents of a carrier. 'We can only conclude that if Congress had intended to make such an inroad on the rights of claimants

> [against negligent agents] it would have said so in unambiguous terms' and 'in the absence of clear Congressional policy to that end, we cannot go so far." (citation ommitted) 359 U.S. 297, 301-02.

The Supreme Court has thus consistently refused to judicially extend admiralty law and jurisdiction beyond its traditional boundries.

Global's petition raises no issues so compelling as to justify the abandonment of this long-standing rule.

2. There is no conflict among the Circuits.

Despite the laundry list of cases cited by petitioner, none of those cases specifically dealt with a local law which invalidated the package limitation, and none of the cases

cited specifically held federal law applicable to torts occurring on the pier to the exclusion of state law. They are merely cases which dealt with the construction of Himalaya clauses as a matter of general contract law. Such cases are not inconsistent with the opinion of the Second Circuit herein, as Judge Lumbard has pointed out below.

In one of the cases cited by petitioner, La Salle Machine Tool Inc., v. Maher Terminals Inc. 611 F.2d 56, 57 (4th Cir. 1979) the Court specifically noted in a footnote that it was not necessary to its decision to draw a distinction between state and federal law since in that case the result would have been the same:

> " 1. Although both parties agree the Maryland law applies for at least some of the issues in this case, see Leather's Best Inc. v. S.S. Mormaclynx, 441 F.2d 800,807,808 (2d Cir. 1971), they both rely almost exclusively on federal cases. In view of the district court's conclusion that the same result would be reached under either Maryland or federal law, which neither party disputes, we find it unnecessary to determine whether state or federal law governs the particular issues on this appeal."

Since none of the cases cited by petitioner specifically holds federal law applicable ex proprio vigore to torts on the pier, or deals with a state statute invalidating limitations of liability, there is thus now no conflict among the circuits, and no reason to presume one will develop.

CONCLUSION

Neither reason urged by petitioner for the granting of the writ is valid. Since the claim of plaintiff is based on the tort of conversion in a warehouse on land, admiralty has no jurisdiction, and "uniformity of maritime law" is thus of no relevance. Moreover, the decision below is supported by clear authority in this Court.

Further, although petitioner urges that federal law should apply, it does not specify what federal law. The Carriage of Goods by Sea Act has been held inapplicable to stevedores in Robert C. Herd v. Krawill Machinery, (id.). The other federal statute cited by Global,

The Shipping Act of 1916, U.S.C. 801-802, contains no provision whatever regarding limitations of liability.

What petitioner is thus proposing is that this Court create an area of federal law not heretofore judicially recognized and not legislated by Congress, in violation of the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), where Mr. Justice Brandeis held:

> "Third. Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no

> federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts...." 304 U.S. 64,78.

Global asks the Supreme Court to assume Congress' traditional role to expand admiralty jurisdiction in order to create a limitation of liability in favor of warehousemen who convert property entrusted to them for safekeeping. It would be difficult to imagine a party with less equity in its favor demanding more extraordinary relief.

No compelling reason for the granting of a writ of Certiorari having been given, the petition should be denied.

Respectfully Submitted,

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Amicus Brief

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF NEW YORK SHIPPING ASSOCIATION, INC.

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The New York Shipping Association, Inc. moves the Court to grant leave to file the attached Brief *Amicus Curiae* in support of the Petitioner in the above case, and as grounds therefore respectfully shows:

1.

Petitioner has given its consent to the filing. Counsel for respondent has declined consent. The written consent letter has been filed with the Clerk of this Court.

The case is the first to be considered by this Court on the questions of the application of the Uniform Commercial Code ("U.C.C.") to a transaction involving interstate—international (foreign) commerce to wit: the movement

of goods, in the stream of commerce, to be carried aboard a vessel operating on navigable waters. *Colgate* is likely to have a wide and dramatic precedential effect. The right of a steamship company's terminal operator to limit its liability through the application, by contract, of Federal law—the *United States Carriage of Goods by Sea Act* (COGSA), 46 U.S.C. § 1300 et seq., will be impaired and the uniformity of Maritime Law disrupted.

2.

Additionally, counsel for petitioner probably will not present the significance of certain decisions of this Court and other Federal Courts concerning state law ("U.C.C.") as it impacts upon the uniformity of maritime law required in international trade. Amicus believes strongly that the decision below conflicts directly with the holdings of this Court that State law can not preempt Federal law. The attached brief is offered to bring these authorities to the attention of the court.

3.

New York Shipping Association, Inc., ("NYSA") is a not-for-profit membership corporation comprised of over one hundred stevedoring companies, steamship owners, agents and operators, and terminal operating and freight handling companies located geographically within the Port of New York and New Jersey. Much of the cargo operations within the area of navigable waters of the Port of New York and New Jersey fall within the business activities of the members of NYSA. Many of its members operate in many other ports on the Atlantic, Gulf and West Coast of the United States. The Association and its members are vitally concerned with the application of state law ("U.C.C.") to an area which had been governed pre-

viously by Federal Law and which now becomes subject to the different laws of a multitude of states.

4.

The principal reason assigned by counsel for respondent for declining to consent to the filing of the Amicus Brief is his opinion that the legal issue involved is not one that affects the uniformity of maritime law. His belief in this regard is erroneous. Therefore, the legal arguments contained in the attached brief apparently will not be presented to this Court through any other means save the attached brief.

5.

NYSA suggests a simple two prong test which, if adopted, it believes would resolve substantially all of the questions relating to the liability of a terminal operator. The questions to be applied in this test as to cargo in the terminal operator's care, for shipment aboard vessels engaged in international trade and foreign commerce pursuant to dock receipts and bills of lading issued in accordance with the *Pomerene Bills of Lading Act* 49 U.S.C. §§ 81-122 (1916), *Shipping Act of 1916*, 46 U.S.C. §§ 801-842 and the *United States Carriage of Goods by Sea Act* 46 U.S.C. §§ 1300-1315, are:

1. If cargo has commenced to move, in the stream of interstate and/or international commerce pursuant to a maritime contractual arrangement, is the transaction subject to Federal Law?

2. Can state law ("U.C.C.") be applied to alter and change the legal responsibilities and obligations of the parties involved in the transaction?

Amicus urges adoption of such test and its application to the case before the Court.

WHEREFORE, New York Shipping Association, Inc. respectfully prays that its motion for leave to file Brief Amicus be granted.

Respectfully submitted,

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BRIEF *AMICUS CURIAE*

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members are vitally concerned with the application of state law ("U.C.C.") to an area which had been governed previously by Federal Law and which now becomes subject to the different laws of a multitude of states.

ARGUMENT

Federal Law Controls Interstate and Foreign Commerce Not Statutory State Law.

A. *State Interest.*

A state's interest to be served by applying Article 7 of the Uniform Commercial Code ("U.C.C.") is vastly outweighed by the gravity of its impact on maritime commerce. To permit state law, not federal law, to apply to maritime contracts would be to ignore this Court's repeated mandate as to the necessity for the uniformity of supremacy of the martime law.

This Court in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), set down the guiding principle on the question of whether a contract is "maritime and local" and the affect of the application of state law on the uniformity of Maritime law.

> [I]t must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. [Citation omitted] *Any further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdicition. The Lottawanna*, 88 U.S. (21 Wall.) 558; *Butler* v. *Boston & Savannah Steam-*

ship Co., 130 U.S. 527; *Workman* v. *New York City*, 179 U.S. 552.

244 U.S. at 215 (Emphasis added).

This Court further stated, in the same decision, that state law cannot impede the uniform application of the general maritime law. It was stated that:

> [E]qually well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits . . . [citation omitted]. And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or *works material prejudge to the characteristic features of general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations* . . .

Id. (Emphasis added).

When the Constitution was adopted, the existing maritime law became the law of the United States, subject to the power of Congress to modify or supplement it. 1 *Benedict on Admiralty* (7th ed.) § 109.

Article III, Section 2 of the Constitution provides that the judicial power of the United States shall extend to "all cases of admiralty and maritime jurisdiction." The purpose of this constitutional grant of authority "was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union".

Knickerbocker Ice Co. v. *Steward*, 253 U.S. 149, 164 (1920).

It was clear to the framers of the Constitution that conflicts could arise between and among the several states and with the nations of the world in connection with interstate and international maritime commerce. For this reason the states when adopting the Constitution recognized and accepted that the uniform administration of the general maritime law only could be secured by the transfer of all cases of admiralty and maritime jurisdiction to the national judiciary and vesting in Congress the authority to make all laws necessary and proper to ensure uniformity and harmony. See *Benedict, supra*, § 105.

A state cannot legislate concerning any aspect of maritime commerce if the state law contravenes any act of Congress, works any prejudice to the characteristic features of maritime law, or interferes with its proper harmony and uniformity in its international and interstate relations. *Just* v. *Chambers*, 312 U.S. 383 (1941); *Knickerbocker Ice Co.* v. *Steward*, 253 U.S. 149 (1920); *Union Fish Co.* v. *Erickson*, 248 U.S. 308 (1919); *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917); *Byrd* v. *Byrd*, 1981 A.M.C. 2563 (4th Cir. 1981).

Amicus will show that *Colgate* applied a section of the "U.C.C." § 7-204(2) which prejudices the general maritime law.

B. *New York U.C.C. § 7-204(2) was applied to a foreign commerce movement and created a conflict with the general maritime law.*

Court interpretation of this section, as to conversion, is not uniform. The majority opinion of the Second Circuit applied New York law (to a New Jersey foreign commerce

movement) in finding petitioner liable. *I.C.C. Metals Inc.* v. *Municipal Warehouse Co.*, 50 N.Y.2d 657, 431 N.Y.S.2d 372, 409 N.E.2d 849 (1980). It applied a rule of absolute liability without limitation.

United States District Courts in Illinois and Pennsylvania have refused to accept this interpretation of Section 7-204(2) *Refrigeration Sales Co., Inc.* v. *Mitchell-Jackson, Inc.*, 575 F. Supp. 971 (N.D. Ill. 1983), *Inland Metals Refining* v. *Ceres Marine Terminals*, 557 F. Supp. 344 (N.D. Ill. 1983), *Western Mining Corporation Limited* v. *Standard Terminals, Inc.*, —— F. Supp. —— (W.D. Pa. 1984) unreported. These three cases applied the laws of Illinois, Indiana and Pennsylvania in cases not involving *"Cogsa"*.

Each Court expressly rejected the New York concept of absolute liability without limitation.

If the loss in *Colgate* had occurred at a terminal in Pennsylvania, the Second Circuit would have had to apply Pennsylvania law, (assuming state law controlled), and the terminal operator would have been able to limit its liability.

In any event, the fortuity of the port would create disharmony and conflict with the general maritime law.

C. New York U.C.C. § 7-103 conceding the supremacy of federal law, was not applied in Colgate.

This section by its language makes Article 7 subject to Federal law. The official comment as to the purpose of Section 7-103 New York "UCC" states that it was to assure that applicable federal law is paramount.

The applicability of Article 7 is stated in the New York Uniform Commercial Code (McKinney 1964) § 7-101:

> The Federal Government has pre-empted the field of bills of lading in interstate and international shipments and the enactment of the Code in New York would not alter this fact. (49 U.S.C. § 81 et seq.)

Prior to *Colgate* the Second Circuit held that § 7-309(2) New York "U.C.C." did not apply in light of § 7-103. *Iligan Integrated Steel Mills, Inc.* v. *John Weyerhaeuser*, 507 F.2d 68 (2nd Cir. 1974). The majority in *Colgate* failed to follow the holding in *Iligan, supra*, that all the provisions of Article 7 are subject to § 7-103.

D. *Dart Containerline-Global Contract was not a warehouse agreement but an arrangement subject to general maritime law.*

The Cargo of drums was delivered to Global for shipment aboard a Dart Containerline vessel. The drums were, at that point, in the stream of international commerce. The shipper received a dock receipt (not a warehouse receipt). The dock receipt incorporated all the terms and conditions of Dart Containerline's bill of lading, including the *United States Carriage of Goods by Sea Act*, 46 U.S.C. §§ 1300-1315 (1936) (COGSA). Global, a terminal operator and stevedore, was paid for its services under its agreement with Dart. The shipper did not pay Global. The agreement between Global and Dart is a maritime contract, *Marubeni-Iida (America), Inc.* v. *Nippon Yusen Kaisha*, 207 F. Supp. 418 (S.D.N.Y. 1962), subject to the regulatory powers of the Federal Maritime Commission.

Global acted as a terminal operator not a warehouseman. It was not a licensed warehouseman, did not perform any warehouse function and did not issue a warehouse receipt. Global performed its duties pursuant to the terms of its agreement with *Dart*. No contractual relationship existed between *Global* and *Colgate*.

E. *The Dissenting Opinion sets forth the correct Federal principles of law.*

Judge Van Graafeiland in his opinion carefully reviewed and analyzed the judicial history permitting a terminal operator/stevedore company to limit its liability under "COGSA" since this court's decision in *C. Herd & Co.* v. *Krawill Mach. Corp.*, 359 U.S. 29 (1959). This limitation arises out of the contractual arrangement between the cargo interest (*shipper*) and the steamship carrier (Emphasis supplied).

The cases set forth in the dissenting opinion* support the two prong test suggested by Amicus. *Colgate* should have applied this test.

If this Court does not grant *Global's* petition for Certiorari, the conflicts between and among United States Courts (as to whether Section 7-204(2) applies to a Maritime transaction) will increase, as each court applies its own determination as to the Section's meaning under state law.

CONCLUSION

The Second Circuit decision is disruptive of the uniformity and supremacy of the general maritime law. The petition should be granted.

Respectfully submitted,

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* See pages 15(a)-18(a) Appendix to Petition for Writ of Certiorari.

Certificate of Service

I hereby certify that on the 2nd day of April, 1984, three (3) copies of the annexed motion for leave to file a brief amicus curiae and amicus curiae brief was served upon

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at the addresses designated by said attorneys for that purpose.

I further certify that all parties required to be served have been served.

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